

CONFERENCE COMMITTEE REPORT DIGEST FOR ESB 509

Citations Affected: IC 5-22; IC 24-4.7-5-1; IC 24-5; IC 32-27.

Synopsis: Deceptive acts, attorney general, and new home warranties. Conference committee report for ESB 509. Defines an offer to cure a deceptive act as a cure that: (1) is reasonably calculated to remedy the consumer's loss; and (2) includes an additional amount of the greater of 10% of the value of the cure or \$500. Provides that: (1) the court may award additional damages for a willful deceptive act; (2) an offer to cure is only admissible as evidence in a proceeding to show that a party is not entitled to attorney's fees; and (3) a respondent may not be held liable for attorney's fees and court costs unless the actual damages awarded exceed the value of the offer to cure. Specifies that the real estate exclusion for uncured deceptive acts under this section includes a claim involving a construction defect that is brought against a construction professional. Requires a contractor that contracts with a governmental body to certify that the contractor, the contractor's affiliates, and persons acting on behalf of the contractor or its affiliates have not violated the terms of the telephone privacy act in the previous year, and will not violate the terms of the telephone privacy act, telephone solicitation act, or automatic dialing act for the duration of the contract. Permits the attorney general to institute a civil action to void a contract if the contractor: (1) falsely asserts past compliance with the telephone privacy act; or (2) violates the terms of the telephone privacy act, telephone solicitation act, or automatic dialing act while the contract is in effect. Excludes contracts where one party is a political subdivision from compliance with the telephone privacy contracting restrictions. Provides that the warranty date for a new home begins on the date of first occupancy of the new home by the builder, a renter, a person living in the home at the request of the builder, or the initial home buyer. Provides that when a home is sold by the builder, a renter, or a person living in the home at the request of the builder the warranty must include the warranty date and the amount of time remaining under the warranty. **(This conference committee report: (1) removes a provision that would have specified the law concerning public purchasing applies to every use of funds by a governmental body instead of every expenditure of funds; (2) defines "affiliate" for purposes of the law concerning public purchasing; (3) removes the definition of "in good standing"; (4) requires the attorney general to notify a contractor, the department of administration, and the state budget agency before the attorney general brings a civil action to void a contract between a contractor and a governmental body because the contractor violated certain laws concerning telephone solicitation and automatic dialing machines; and**

(5) removes a provision that would have allowed the attorney general to recover costs and attorney's fees in the civil action.)

Effective: Upon passage; July 1, 2005.

Adopted

Rejected

CONFERENCE COMMITTEE REPORT

MR. SPEAKER:

Your Conference Committee appointed to confer with a like committee from the Senate upon Engrossed House Amendments to Engrossed Senate Bill No. 509 respectfully reports that said two committees have conferred and agreed as follows to wit:

that the Senate recede from its dissent from all House amendments and that the Senate now concur in all House amendments to the bill and that the bill be further amended as follows:

- 1 Delete everything after the enacting clause and insert the following:
- 2 SECTION 1. IC 5-22-1-3 IS AMENDED TO READ AS FOLLOWS
- 3 [EFFECTIVE UPON PASSAGE]: Sec. 3. **(a) Except as provided in**
- 4 **subsection (b),** this article does not apply to the following types of
- 5 activities:
- 6 (1) A contract between governmental bodies except for a contract
- 7 authorized under this article.
- 8 (2) A public works project.
- 9 (3) A collective bargaining agreement between a governmental
- 10 body and its employees.
- 11 (4) The employment relationship between a governmental body
- 12 and an employee of the governmental body.
- 13 (5) An investment of public funds.
- 14 (6) A contract between a governmental body and a body corporate
- 15 and politic.
- 16 (7) A contract for social services.
- 17 **(8) A contract with a body corporate and politic.**
- 18 **(b) IC 5-22-3-7 applies to any:**
- 19 **(1) contract;**
- 20 **(2) project;**
- 21 **(3) agreement;**
- 22 **(4) employment relationship; or**
- 23 **(5) investment;**

described in subsection (a).

SECTION 2. IC 5-22-2-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1. **Except as otherwise provided**, the definitions in this chapter apply throughout this article.

SECTION 3. IC 5-22-2-1.3 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1.3. **"Affiliate" means a business entity that effectively controls or is controlled by a contractor or associated with a contractor under common ownership or control, whether by shareholdings or other means, including a subsidiary, parent, or sibling of a contractor.**

SECTION 4. IC 5-22-3-7 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 7. (a) **This section applies to every use of funds by a governmental body. However, this section does not apply to a contract in which one (1) party is a political subdivision, including a body corporate and politic created by or authorized by a political subdivision.**

(b) **A prospective contractor may not contract with a governmental body unless the prospective contractor includes the following certifications as terms of the contract with the governmental body:**

(1) **The contractor and any principals of the contractor certify that:**

(A) **the contractor, except for de minimis and nonsystematic violations, has not violated the terms of:**

(i) **IC 24-4.7;**

(ii) **IC 24-5-12; or**

(iii) **IC 24-5-14;**

in the previous three hundred sixty-five (365) days, even if IC 24-4.7 is preempted by federal law; and

(B) **the contractor will not violate the terms of IC 24-4.7 for the duration of the contract, even if IC 24-4.7 is preempted by federal law.**

(2) **The contractor and any principals of the contractor certify that an affiliate or principal of the contractor and any agent acting on behalf of the contractor or on behalf of an affiliate or principal of the contractor:**

(A) **except for de minimis and nonsystematic violations, has not violated the terms of IC 24-4.7 in the previous three hundred sixty-five (365) days, even if IC 24-4.7 is preempted by federal law; and**

(B) **will not violate the terms of IC 24-4.7 for the duration of the contract, even if IC 24-4.7 is preempted by federal law.**

(c) **If a certification in subsection (b) concerning compliance with IC 24-4.7, IC 24-5-12, or IC 24-5-14 is materially false or if the contractor, an affiliate or a principal of the contractor, or an agent acting on behalf of the contractor or an affiliate or a principal of the contractor violates the terms of IC 24-4.7, IC 24-5-12, or IC 24-5-14, even if IC 24-4.7 is preempted by federal law, the attorney general may bring a civil action in the circuit or superior**

1 court of Marion County to:

2 (1) void a contract under this section, subject to subsection (d);

3 and

4 (2) obtain other proper relief.

5 However, a contractor is not liable under this section if the
6 contractor or an affiliate of the contractor acquires another
7 business entity that violated the terms of IC 24-4.7, IC 24-5-12, or
8 IC 24-5-14 within the preceding three hundred sixty-five (365) days
9 before the date of the acquisition if the acquired business entity
10 ceases violating IC 24-4.7, IC 24-5-12, or IC 24-5-14, even if
11 IC 24-4.7 is preempted by federal law, as of the date of the
12 acquisition.

13 (d) If:

14 (1) the attorney general notifies the contractor, department of
15 administration, and budget agency in writing of the intention
16 of the attorney general to void a contract; and

17 (2) the attorney general does not receive a written objection
18 from the department of administration or budget agency, sent
19 to both the attorney general and the contractor, within thirty

20 (30) days of the notice;

21 a contract between a contractor and a governmental body is
22 voidable at the election of the attorney general in a civil action
23 brought under subsection (c). If an objection of the department of
24 administration or the budget agency is submitted under subdivision
25 (2), the contract that is the subject of the objection is not voidable
26 at the election of the attorney general unless the objection is
27 rescinded or withdrawn by the department of administration or the
28 budget agency.

29 (e) If the attorney general establishes in a civil action that a
30 contractor is knowingly, intentionally, or recklessly liable under
31 subsection (c), the contractor is prohibited from entering into a
32 contract with a governmental body for three hundred sixty-five
33 (365) days after the date on which the contractor exhausts appellate
34 remedies.

35 (f) In addition to any remedy obtained in a civil action brought
36 under this section, the attorney general may obtain the following:

37 (1) All money the contractor obtained through each telephone
38 call made in violation of the terms of IC 24-4.7, IC 24-5-12, or
39 IC 24-5-14, even if IC 24-4.7 is preempted by federal law.

40 (2) The attorney general's reasonable expenses incurred in:

41 (A) investigation; and

42 (B) maintaining the civil action.

43 SECTION 5. IC 24-4.7-5-1 IS AMENDED TO READ AS
44 FOLLOWS[EFFECTIVE JULY 1, 2005]: Sec. 1. A telephone solicitor
45 who fails to comply with any provision of IC 24-4.7-4 commits a
46 deceptive act that is actionable by the attorney general under this
47 chapter. In addition, a contractor who contracts or seeks to contract
48 with the state:

49 (1) may be prohibited from contracting with the state; or

50 (2) may have an existing contract with the state voided;

51 if the contractor, an affiliate or principal of the contractor, or any

agent acting on behalf of the contractor or an affiliate or principal of the contractor does not or has not complied with the terms of this article, even if this article is preempted by federal law.

SECTION 6. IC 24-5-0.5-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 2. (a) As used in this chapter:

(1) "Consumer transaction" means a sale, lease, assignment, award by chance, or other disposition of an item of personal property, real property, a service, or an intangible, except securities and policies or contracts of insurance issued by corporations authorized to transact an insurance business under the laws of the state of Indiana, with or without an extension of credit, to a person for purposes that are primarily personal, familial, charitable, agricultural, or household, or a solicitation to supply any of these things. However, the term includes a transfer of structured settlement payment rights under IC 34-50-2.

(2) "Person" means an individual, corporation, the state of Indiana or its subdivisions or agencies, business trust, estate, trust, partnership, association, nonprofit corporation or organization, or cooperative or any other legal entity.

(3) "Supplier" means:

(A) a seller, lessor, assignor, or other person who regularly engages in or solicits consumer transactions, including a manufacturer, wholesaler, or retailer, whether or not ~~he~~ **the person** deals directly with the consumer; or

(B) a person who contrives, prepares, sets up, operates, publicizes by means of advertisements, or promotes a pyramid promotional scheme.

(4) "Subject of a consumer transaction" means the personal property, real property services, or intangibles furnished in a consumer transaction.

(5) "Cure" as applied to a deceptive act, means either:

(A) to offer in writing to adjust or modify the consumer transaction to which the act relates to conform to the reasonable expectations of the consumer generated by such deceptive act and to perform such offer if accepted by the consumer; or

(B) to offer in writing to rescind such consumer transaction and to perform such offer if accepted by the consumer.

The term includes an offer in writing of one (1) or more items of value, including monetary compensation, that the supplier delivers to a consumer or a representative of the consumer if accepted by the consumer.

(6) "Offer to cure" as applied to a deceptive act is a cure that:

(A) is reasonably calculated to remedy a loss claimed by the consumer; and

(B) includes a minimum additional amount that is the greater of:

(i) ten percent (10%) of the value of the remedy under clause (A), but not more than four thousand dollars (\$4,000); or

(ii) five hundred dollars (\$500);

as compensation for attorney's fees, expenses, and other costs that a consumer may incur in relation to the deceptive act.

~~(6)~~ (7) "Uncured deceptive act" means a deceptive act:

(A) with respect to which a consumer who has been damaged by such act has given notice to the supplier under section 5(a) of this chapter; and

(B) either:

(i) no offer to cure has been made to such consumer within thirty (30) days after such notice; or

(ii) the act has not been cured as to such consumer within a reasonable time after ~~his~~ **the consumer's** acceptance of the offer to cure.

~~(7)~~ (8) "Incurable deceptive act" means a deceptive act done by a supplier as part of a scheme, artifice, or device with intent to defraud or mislead. The term includes a failure of a transferee of structured settlement payment rights to timely provide a true and complete disclosure statement to a payee as provided under IC 34-50-2 in connection with a direct or indirect transfer of structured settlement payment rights.

~~(8)~~ (9) "Pyramid promotional scheme" means any program utilizing a pyramid or chain process by which a participant in the program gives a valuable consideration exceeding one hundred dollars (\$100) for the opportunity or right to receive compensation or other things of value in return for inducing other persons to become participants for the purpose of gaining new participants in the program. The term does not include ordinary sales of goods or services to persons who are not purchasing in order to participate in such a scheme.

~~(9)~~ (10) "Promoting a pyramid promotional scheme" means:

(A) inducing or attempting to induce one (1) or more other persons to become participants in a pyramid promotional scheme; or

(B) assisting another in promoting a pyramid promotional scheme.

~~(10)~~ (11) "Elderly person" means an individual who is at least sixty-five (65) years of age.

(b) As used in section 3(a)(15) of this chapter:

(1) "Directory assistance" means the disclosure of telephone number information in connection with an identified telephone service subscriber by means of a live operator or automated service.

(2) "Local telephone directory" refers to a telephone classified advertising directory or the business section of a telephone directory that is distributed by a telephone company or directory publisher to subscribers located in the local exchanges contained in the directory. The term includes a directory that includes listings of more than one (1) telephone company.

(3) "Local telephone number" refers to a telephone number that has the three (3) number prefix used by the provider of telephone service for telephones physically located within the area covered by the local telephone directory in which the number is listed. The

term does not include long distance numbers or 800-, 888-, or 900-exchange numbers listed in a local telephone directory.

SECTION 7. IC 24-5-0.5-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 4. (a) A person relying upon an uncured or incurable deceptive act may bring an action for the damages actually suffered as a consumer as a result of the deceptive act **or five hundred dollars (\$500), whichever is greater. The court may increase damages for a willful deceptive act in an amount that does not exceed the greater of:**

- (1) three (3) times the actual damages of the consumer suffering the loss; or**
- (2) one thousand dollars (\$1,000).**

Except as provided in subsection (j), the court may award reasonable attorney fees to the party that prevails in an action under this subsection. This subsection does not apply to a consumer transaction in real property, **including a claim or action involving a construction defect (as defined in IC 32-27-3-1(5)) brought against a construction professional (as defined in IC 32-27-3-1(4)),** except for purchases of time shares and camping club memberships. **This subsection also does not apply to a violation of IC 24-4.7, IC 24-5-12, or IC 24-5-14.** Actual damages awarded to a person under this section have priority over any civil penalty imposed under this chapter.

(b) Any person who is entitled to bring an action under subsection (a) on the person's own behalf against a supplier for damages for a deceptive act may bring a class action against such supplier on behalf of any class of persons of which that person is a member and which has been damaged by such deceptive act, subject to and under the Indiana Rules of Trial Procedure governing class actions, except as herein expressly provided. **Except as provided in subsection (j),** the court may award reasonable attorney fees to the party that prevails in a class action under this subsection, provided that such fee shall be determined by the amount of time reasonably expended by the attorney and not by the amount of the judgment, although the contingency of the fee may be considered. Any money or other property recovered in a class action under this subsection which cannot, with due diligence, be restored to consumers within one (1) year after the judgment becomes final shall be returned to the party depositing the same. This subsection does not apply to a consumer transaction in real property, except for purchases of time shares and camping club memberships. Actual damages awarded to a class have priority over any civil penalty imposed under this chapter.

(c) The attorney general may bring an action to enjoin a deceptive act. However, the attorney general may seek to enjoin patterns of incurable deceptive acts with respect to consumer transactions in real property. In addition, the court may:

- (1) issue an injunction;
- (2) order the supplier to make payment of the money unlawfully received from the aggrieved consumers to be held in escrow for distribution to aggrieved consumers; and
- (3) order the supplier to pay to the state the reasonable costs of the

1 attorney general's investigation and prosecution related to the
2 action.

3 (d) In an action under subsection (a), (b), or (c), the court may void
4 or limit the application of contracts or clauses resulting from deceptive
5 acts and order restitution to be paid to aggrieved consumers.

6 (e) In any action under subsection (a) or (b), upon the filing of the
7 complaint or on the appearance of any defendant, claimant, or any other
8 party, or at any later time, the trial court, the supreme court, or the court
9 of appeals may require the plaintiff, defendant, claimant, or any other
10 party or parties to give security, or additional security, in such sum as
11 the court shall direct to pay all costs, expenses, and disbursements that
12 shall be awarded against that party or which that party may be directed
13 to pay by any interlocutory order by the final judgment or on appeal.

14 (f) Any person who violates the terms of an injunction issued under
15 subsection (c) shall forfeit and pay to the state a civil penalty of not
16 more than fifteen thousand dollars (\$15,000) per violation. For the
17 purposes of this section, the court issuing an injunction shall retain
18 jurisdiction, the cause shall be continued, and the attorney general
19 acting in the name of the state may petition for recovery of civil
20 penalties. Whenever the court determines that an injunction issued
21 under subsection (c) has been violated, the court shall award reasonable
22 costs to the state.

23 (g) If a court finds any person has knowingly violated section 3 or 10
24 of this chapter, the attorney general, in an action pursuant to subsection
25 (c), may recover from the person on behalf of the state a civil penalty
26 of a fine not exceeding five hundred dollars (\$500) per violation.

27 (h) An elderly person relying upon an uncured or incurable deceptive
28 act, including an act related to hypnotism, may bring an action to
29 recover treble damages, if appropriate.

30 (i) **An offer to cure is:**

- 31 **(1) not admissible as evidence in a proceeding initiated under**
32 **this section unless the offer to cure is delivered by a supplier to**
33 **the consumer or a representative of the consumer before the**
34 **supplier files the supplier's initial response to a complaint; and**
35 **(2) only admissible as evidence in a proceeding initiated under**
36 **this section to prove that a supplier is not liable for attorney's**
37 **fees under subsection (j).**

38 **If the offer to cure is timely delivered by the supplier, the supplier**
39 **may submit the offer to cure as evidence to prove in the proceeding**
40 **in accordance with the Indiana Rules of Trial Procedure that the**
41 **supplier made an offer to cure.**

42 **(j) A supplier may not be held liable for the attorney's fees and**
43 **court costs of the consumer that are incurred following the timely**
44 **delivery of an offer to cure as described in subsection (i) unless the**
45 **actual damages awarded, not including attorney's fees and costs,**
46 **exceed the value of the offer to cure.**

47 SECTION 8. IC 24-5-12-23 IS AMENDED TO READ AS
48 FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 23. A seller who fails
49 to comply with any provision of:

- 50 **(1) this chapter; or**
51 **(2) IC 24-4.7;**

commits a deceptive act that is actionable by the attorney general under IC 24-5-0.5-4(c) and is subject to the penalties set forth in IC 24-5-0.5. **An action for a violation of IC 24-4.7 may be brought under IC 24-5-0.5-4(c) or IC 24-4.7-5.** An action by the attorney general for a violation of this chapter **or IC 24-4.7** may be brought in the circuit or superior court of Marion County.

SECTION 9. IC 32-27-2-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 7. As used in this chapter, "warranty date" means the date of the first occupancy of the new home as a residence by ~~the initial home buyer~~: **one (1) of the following:**

(1) The builder.

(2) An individual or individuals renting the home from the builder.

(3) An individual or individuals living in the home at the request of the builder.

(4) The initial home buyer.

SECTION 10. IC 32-27-2-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 8. (a) In selling a completed new home, and in contracting to sell a new home to be completed, the builder may warrant to the initial home buyer the following:

(1) During the two (2) year period beginning on the warranty date, the new home will be free from defects caused by faulty workmanship or defective materials.

(2) During the two (2) year period beginning on the warranty date, the new home will be free from defects caused by faulty installation of:

(A) plumbing;

(B) electrical;

(C) heating;

(D) cooling; or

(E) ventilating;

systems, exclusive of fixtures, appliances, or items of equipment.

(3) During the four (4) year period beginning on the warranty date, the new home will be free from defects caused by faulty workmanship or defective materials in the roof or roof systems of the new home.

(4) During the ten (10) year period beginning on the warranty date, the new home will be free from major structural defects.

(b) The warranties provided in this section (or IC 34-4-20.5-8 or IC 32-15-7 before their repeal) survive the passing of legal or equitable title in the new home to a home buyer.

(c) An individual identified in section 7(1), 7(2), or 7(3) of this chapter who is selling a new home shall notify the purchaser of the home in writing on or before the date of closing or transfer of the new home of:

(1) the warranty date (as defined in section 7 of this chapter); and

(2) the amount of time remaining under the warranty.

SECTION 11. [EFFECTIVE UPON PASSAGE] IC 5-22-1-3,

- 1 **IC 5-22-2-1, IC 24-4.7-5-1, and IC 24-5-12-23, all as amended by**
- 2 **this act, and IC 5-22-3-7, as added by this act, apply only to a**
- 3 **contract entered into or renewed after the effective date of this act.**
- 4 **SECTION 12. An emergency is declared for this act.**
(Reference is to ESB 509 as printed March 29, 2005.)

Conference Committee Report
on
Engrossed Senate Bill 509

Signed by:

Senator Clark
Chairperson

Representative Yount

Senator Lanane

Representative Kuzman

Senate Conferees

House Conferees